U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF H-P-H-H-

DATE: DEC. 9, 2015

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a home health care provider, seeks to permanently employ the Beneficiary as a nurse. The Director, Nebraska Service Center, denied the petition. We dismissed the appeal. The matter is now before us on a motion to reconsider. The motion will be denied.

The Director concluded that the offered position did not require the services of a member of the professions holding an advanced degree as indicated on the Form I-140, Immigrant Petition for Alien Worker. *See* Immigration and Nationality Act (the Act) § 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A) (allocating visas to qualified immigrants who are members of the professions holding advanced degrees or their equivalent). Accordingly, the Director denied the petition on October 23, 2014.

On June 11, 2015, we dismissed the Petitioner's appeal on the same ground. On motion, the Petitioner asserts that it did not request classification of the Beneficiary as an advanced degree professional.

I. THE PETITIONER'S MOTION

A motion to reconsider must "establish that the decision was based on an incorrect application of law or Service policy" and "that the decision was incorrect based on the evidence of record at the time of the initial decision." 8 C.F.R. § 103.5(a)(3). "A motion that does not meet applicable requirements shall be dismissed." 8 C.F.R. § 103.5(a)(4).

In the instant case, the Petitioner's Form I-290B, Notice of Appeal or Motion, and accompanying brief describe its filing as a motion to reconsider. However, the filing does not meet the regulatory requirements for such a motion.

The Petitioner's motion includes new documentary evidence. Thus, the motion does not allege that the decision was incorrect based on the evidence of record at that time. Rather, the filing meets the requirements for a motion to reopen because it alleges new facts supported by documentary evidence. *See* 8 C.F.R. § 103.5(a)(2) (stating the requirements for a motion to reopen).

The Petitioner's filing does not meet the applicable requirements for a motion to reconsider. Therefore, pursuant to 8 C.F.R. § 103.5(a)(4), we must deny the motion.

II. THE REQUESTED IMMIGRANT CLASSIFICATION

Even if we accepted the filing as a motion to reopen, the record would not establish the petition's approvability in the requested immigrant classification.

Section 1 of Part 2, Form I-140, requires a petitioner to indicate the requested immigrant classification. *See* 8 C.F.R. § 103.2(a)(1) (incorporating a form's instructions into the regulations). Section 2 of Part 2 also requires a petitioner to indicate whether the petition seeks Schedule A designation or an amendment of a prior petition. *See* 20 C.F.R. § 656.5 (explaining that Schedule A includes occupations for which the U.S. Department of Labor (DOL) has pre-determined there are insufficient U.S. workers who are able, willing, qualified, and available, and which will not adversely affect the wages and working conditions of U.S. workers similarly employed).

Once filed, a petition may not be materially changed in an effort to make it comply with applicable requirements. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm'r 1998); *see also Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971) (both holding that a petition must establish eligibility at the time of filing).

In the instant case, Box 1.d. of Part 2, Form I-140, is marked, indicating the petition's request for the Beneficiary's classification as an advanced degree professional. Box 2.b. of Part 2 is also checked, indicating the petition's request for designation of the offered position under Schedule A.

A petition for an advanced degree professional requesting Schedule A designation must demonstrate the offered position's requirement of a professional holding an advanced degree or the equivalent. 8 C.F.R. § 204.5(k)(4)(i). The accompanying ETA Form 9089, Application for Permanent Employment Certification (labor certification), must therefore state the minimum requirements of the offered position of nurse as a U.S. or foreign equivalent degree above that of a baccalaureate, or a U.S. Bachelor's degree or foreign equivalent degree followed by at least five years of progressive experience in the specialty. *See* 8 C.F.R. § 204.5(k)(2) (defining the term "advanced degree").

In the instant case, the accompanying labor certification states the minimum requirements of the offered position as a U.S. Bachelor's degree or a foreign equivalent degree in nursing, without any required experience. The labor certification indicates that the Petitioner will not accept an alternate combination of education and experience. The only other requirement stated on the labor certification is an Illinois nursing license.

The labor certification indicates that the offered position of nurse does not require the services of an advanced degree professional. The requested immigrant classification therefore cannot be granted.

On motion, the Petitioner argues that it did not request the Beneficiary's classification as an advanced degree professional. Rather, it argues that it requested her classification as a nurse under Schedule A.

An employer seeking to employ a professional nurse under Schedule A must demonstrate a beneficiary's receipt of: a certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); a permanent license to practice nursing in the state of intended employment; or passage of the National Council Licensure Examination for Registered Nurses. 20 C.F.R. § 656.15(c)(2). The record contains copies of the Beneficiary's CGFNS certificate and Illinois nursing license, indicating her qualifications for designation as a professional nurse under Schedule A.

However, designation as a professional nurse under Schedule A does not constitute an immigrant classification. Rather, Schedule A is an occupational designation that relieves a petitioner of the burden of filing a labor certification application with the DOL and recruiting for the offered position. *See* 20 C.F.R § 656.15 (stating that applications for Schedule A designation are filed directly to the Department of Homeland Security (DHS) and do not require proof of recruitment).

As indicated in Part 2 of the Form I-140, a petitioner seeking Schedule A designation must still request an immigrant classification. *See also* 8 C.F.R. §§ 204.5(k)(4)(i), (l)(3)(i) (indicating that Schedule A applications may be filed with petitions requesting classifications for advanced degree professionals, professionals, skilled workers, and other workers). In the instant case, based on the minimum requirements for the offered position, the Petitioner could have requested the Beneficiary's immigrant classification as a professional, skilled worker, or other worker by marking the respective boxes at 1.e., 1.f., or 1.g. of Part 2, Form I-140. *See also* INA §§ 203(b)(3)(A)(i), (ii), (iii) (allocating visas to qualified immigrants who are skilled workers, professionals, or other workers).

The Petitioner also attaches a copy of the Form I-140 that it submitted to U.S. Citizenship and Immigration Services (USCIS). The copy does not indicate a request for any immigrant classification in Section 1 of Part 2 and shows a typed "X" in Box 2.b. of Part 2, requesting Schedule A designation.

The Petitioner argues that the copy of the Form I-140 demonstrates that it did not request the Beneficiary's classification as an advanced degree professional. The Petitioner asserts that USCIS "incorrectly categorized" the petition.

In addition to the typed "X" in Box 2.b. of Part 2 requesting Schedule A designation, the original Form I-140 of record contains an "X" handwritten in pen in Box 1.d, indicating a request for immigrant classification as an advanced degree professional. The record also contains a copy of a January 22, 2014, Rejection Notice by USCIS, notifying the Petitioner that Part 2 of Form I-140 "has not been fully completed."

Thus, the record indicates that USCIS initially returned the petition to the Petitioner because it did not select an immigrant classification in Section 1 of Part 2, Form I-140. USCIS records indicate the Petitioner's resubmission of the petition on January 27, 2014, with an "X" handwritten in pen in Box 1.d in Part 2, Form I-140, indicating a request for immigrant classification as an advanced degree professional.

The preponderance of the evidence indicates that the Petitioner marked Box 1.d. in Part 2, Form I-140 and requested immigrant classification of the Beneficiary as an advanced degree professional. The record does not establish the petition's approvability in the requested classification of advanced degree professional. We would therefore have denied a motion to reopen.

III. THE NOTICE OF FILING

Beyond the Director's decision, we note other defects in the petition.[1]

A petition for an advanced degree professional must be accompanied by an individual labor certification from the DOL, an application for Schedule A designation, or evidence of a beneficiary's qualifications for a shortage occupation in the DOL's Labor Market Information Pilot Program. 8 C.F.R. § 204.5(k)(4)(i).

An application for Schedule A designation must include evidence that notice of a labor certification's filing was provided to a bargaining representative or an employer's employees. 20 C.F.R. § 656.15(b)(2). The notice of filing to employees must be posted for at least 10 consecutive business days and provided "between 30 and 180 days before filing the application." 20 C.F.R. §§ 656.10(d)(1)(ii), (3)(iv). DHS determinations on Schedule A applications are "conclusive and final." 20 C.F.R. § 656.15(e).

The instant record contains a notice of filing and a letter from the Petitioner's administrator stating the notice's posting from October 21, 2012 to November 8, 2012. Contrary to 20 C.F.R. § 656.10(d)(3)(iv), the record indicates that the notice was provided more than 180 days before the filing of the instant Schedule A application with the petition on January 27, 2014.

Because the record indicates that the Petitioner did not provide notice of filing pursuant to regulations, the accompanying application for Schedule A designation cannot be granted. The record does not otherwise contain an individual labor certification from the DOL or evidence of the Beneficiary's qualifications for a shortage occupation under DOL's pilot program.

IV. THE BENEFICIARY'S EDUCATIONAL QUALIFICATIONS

Also beyond the Director's decision, the record does not demonstrate the Beneficiary's educational qualifications for the offered position.

A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date. 8 C.F.R. §§ 103.2(b)(l), (12); *see also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Katigbak,* 14 I&N Dec. at 49.

[1] We may deny a petition on a valid ground unidentified by a director. *See* 5 U.S.C. § 557(b) (stating that, except as limited by notice or rule, a federal agency on review retains all the powers it possessed in issuing the original decision).

In evaluating a beneficiary's qualifications, we must examine the job offer portion of an accompanying labor certification to determine the minimum requirements of an offered position. We may neither ignore a term of the labor certification, nor impose additional requirements. *See K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany* v. *Smith,* 696 F.2d 1008, 1015 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc.* v. *Coomey,* 661 F.2d 1, 3 (1st Cir. 1981).

As previously indicated, the instant labor certification states the minimum requirements of the offered position of nurse as a U.S. Bachelor's degree or foreign equivalent degree in nursing, without any experience. The labor certification also requires an Illinois nursing license.

The Beneficiary attested on the labor certification to her receipt of a Bachelor's degree in nursing in 2005 from in the Philippines. The record contains copies of an April 2005 Bachelor of Science degree in nursing and a transcript from the foundation.

However, the degree and transcript identify the recipient by a family name other than the one stated for the Beneficiary on the Form I-140 and accompanying labor certification. The discrepancy in the family name casts doubt on the Beneficiary's claimed qualifications for the offered position. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence).

The record lacks independent, objective evidence explaining the discrepancy in the family name on the Beneficiary's purported educational credentials. The record therefore does not establish her qualifications for the offered position.

V. THE PETITIONER'S ABILITY TO PAY THE PROFFERED WAGE

In addition, the record does not establish the Petitioner's continuing ability to pay the proffered wage.

A petitioner must demonstrate its continuing ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In the instant case, the accompanying labor certification states the proffered wage of the offered position of nurse as $71,100 per year. The petition's priority date is January 27, 2014, the date USCIS received the completed petition. *See* 8 C.F.R. § 204.5(d).

In support of its ability to pay, the Petitioner submitted a January 10, 2014, letter from its financial officer/comptroller. The letter states the Petitioner's generation of about $3.38 million in annual revenue and about $80,000 in net income in 2013.

Where a petitioner employs 100 or more workers, USCIS may accept a statement from a financial officer that establishes the company's ability to pay the proffered wage. 8 C.F.R. § 204.5(g)(2). In the instant case, the Petitioner indicated its employment of 113 people on the Form I-140 and accompanying labor certification.

However, the letter from the financial officer/comptroller conflicts with other information of record. The letter attributes the financial figures to 2013. However, the Petitioner's cover letter to its petition attributes the same figures to 2012. Also, the letter from the financial officer/comptroller states the Beneficiary's offered salary as $71,094 per year. However, the accompanying labor certification states the prevailing wage as $71,094 per year, and the proffered wage as $71,100 per year. The regulation at 8 C.F.R. 204.5(g)(2) requires a petitioner to demonstrate its ability to pay "the proffered wage."

In addition, USCIS records indicate the Petitioner's filing of at least two other petitions that remained pending after the instant petition's priority date.[2] Under these circumstances, the letter from the financial officer/comptroller is insufficient to demonstrate the Petitioner's ability to pay.

A petitioner must demonstrate its ability to pay the proffered wage of each petition it files from the petition's priority date until a beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Therefore, the instant Petitioner must demonstrate its ability to pay the combined proffered wages of the instant Beneficiary and the beneficiaries of any petitions that remained pending after the instant petition's priority date. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-45 (Acting Reg'l Comm'r 1977) (holding that a petitioner's ability to pay is an essential element in determining whether its job offer is realistic). The Petitioner must demonstrate its ability to pay the combined proffered wages from the instant petition's priority date until the other two beneficiaries obtained lawful permanent residence, or until their petitions were denied, withdrawn, or revoked. *See Patel v. Johnson*, 2 F. Supp. 3d 118, 124 (D. Mass. 2014) (upholding our denial of a petition where the petitioner did not demonstrate its ability to pay multiple beneficiaries).

The record does not indicate the proffered wages or priority dates of the other two pending petitions, or whether the Petitioner paid wages to the other beneficiaries. The record also does not indicate whether any of the other beneficiaries obtained lawful permanent residence or whether their petitions were denied, withdrawn, or revoked. Without this information, we cannot determine the Petitioner's ability to pay the combined proffered wages of its beneficiaries. In addition, the record does not contain copies of the Petitioner's annual reports, federal income tax returns, or audited financial statements from the petition's priority date onward pursuant to 8 C.F.R. § 204.5(g)(2).

For the foregoing reasons, the record does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward.

---

[2] USCIS records identify the other petitions by the following receipt numbers: [redacted]; and [redacted]

VI. CONCLUSION

The Petitioner's filing does not meet the requirements for a motion to reconsider. We must therefore deny the motion. Even if we accepted the filing as a motion to reopen, the record would not establish the petition's approvability in the requested immigrant classification. The record also would not establish eligibility for the requested Schedule A designation, the Beneficiary's educational qualifications for the offered position, or the Petitioner's continuing ability to pay the proffered wage.

The motion will be denied for the foregoing reasons. In visa petition proceedings, a petitioner bears the burden of establishing its eligibility for the requested benefit. INA § 291, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner has not met that burden.

ORDER: The motion to reconsider is denied.

Cite as *Matter of H-P-H-H-*, ID# 15087 (AAO Dec. 9, 2015)